

A Sigma Elevator (M) Sdn Bhd v Isyoda (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22C-40-07 OF
2014

B MARY LIM J
1 DECEMBER 2015

C *Contract — Building contract — Payment — Contract for supply and installation of lifts — Claim for balance contract price and additional works — Whether pay when paid clause applied — Whether claim to be made directly against developer and not main contractor — Effect of letter of release and waiver and settlement agreement — Whether claims of defects justified*

D The plaintiff were elevator specialists. By letter of award dated 27 November 2006, Brampton Holdings Sdn Bhd ('Brampton') appointed the defendant, Isyoda (M) Sdn Bhd ('Isyoda') as the main turnkey design and building contractor in relation to a development project. A formal agreement dated 11 December 2006 was subsequently drawn up to the same effect ('main contract'). On 14 December 2006, Isyoda awarded a contract to Sigma as a subcontractor for vertical transportation services required in the project ('the subcontract'). On 8 August 2010, Isyoda also instructed Sigma to carry out additional works to the value of RM55,575. Brampton had no knowledge of these additional works. On 1 October 2010, Brampton took possession of the project. Isyoda and Brampton entered into two supplemental agreements on 15 June 2011 for the settlement of disputes that had arisen between Isyoda and Brampton. One of the disputes was the matter of payments to Sigma. Sigma claimed that it had completed the works under the subcontract and that it was not fully paid. Sigma claimed the sum of RM1,180,291.52 due under the subcontract and a sum of RM1,389.38 due for additional works. Isyoda refused to pay the RM1,180,291.52 under the subcontract citing several reasons, as follow: (a) that under cl 3.0 of the subcontract, Sigma was only entitled to payment after Isyoda received payment from Brampton. Since Isyoda had not received from Brampton the payment claimed by Sigma, Isyoda contended that there was no obligation on Isyoda to pay Sigma; (b) vide letter dated 11 October 2012, Sigma had agreed to release Isyoda from its obligations to pay Sigma and had waived all sums due and owing by Isyoda under the subcontract (letter of release and waiver); and (c) that by the letter of release and waiver and settlement agreement dated 4 February 2013('SA'), it had been agreed between Sigma, Isyoda and Brampton that all sums due and owing under the subcontract will be paid by Brampton directly to Sigma. Isyoda commenced third party proceedings against Brampton seeking indemnity against Brampton. Brampton denied that it had agreed to indemnify Isyoda in the supplemental agreements. Brampton also counterclaimed on the grounds

that the escalators were defective in two respects. The first defect concerned the step rollers and the step chain rollers; and the second defect was that the landings of many of the 52 escalators were not flushed with the floor such that the escalator landings were higher than the floor.

A

Held, allowing Sigma's claim and dismissing Isyoda's and Brampton's counterclaim with costs:

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(1) The subcontract contained all the terms and conditions governing the relationship of Sigma and Isyoda. Since Sigma was engaged by Isyoda, it was Isyoda that had to pay for all services and work rendered by Sigma (see para 29).

C

(2) The issue or defence of pay when paid under the subcontract was not available to Isyoda. Under the terms of the settlement agreement, Isyoda will never be paid by Brampton for work done by Sigma since Brampton was to pay Sigma directly whereas the argument of a back to back agreement was that Isyoda will only pay Sigma when it was paid by Brampton. Isyoda could not hold on to both arguments which were inconsistent with one another (see para 34).

D

(3) The letter of release and waive bore only the signature of Sigma. Both Brampton and Isyoda did not sign the letter. The affixing of a signature by the contracting party is important and material as it signifies agreement and commitment to the terms as appearing in the relevant document upon which the signature appears. When Isyoda amended the letter of release and waiver instead of signing it, it showed that both parties had actually not reached any consensus ad idem on the matter. In the face of such non-agreement, Isyoda could not possibly rely on the letter of release and waiver which Isyoda itself wanted amended; and had not signed (see para 47).

E

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(4) The SA was intended to end and settle all disputes between Brampton and Isyoda. It was an agreement that did not involve Sigma. By no means was it a tripartite agreement between the three parties before the court where it was agreed that Sigma was to be paid directly by Brampton. The existence of the SA did not absolve Isyoda from its obligations to pay Sigma for work done under the subcontract. For that, Isyoda remained very much liable under the subcontract to pay Sigma for work that Sigma had completed (see paras 60–62).

G

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(5) Isyoda's agreement with Brampton that Brampton will pay Sigma directly did not discharge Isyoda from its obligations to pay Sigma. This is because Sigma was not a party to the arrangements under the SA (see para 64).

I

(6) Sigma was not liable for the escalator landing defects. Sigma's role was merely to supply and install the escalators in accordance with the

- A specifications contained in the approved shop drawings. The work of ensuring that these escalators are flushed with the floors is part of the finishing work which falls within Isyoda's scope of works. However, Isyoda was also not responsible for these defects. Isyoda had made the necessary proposals on rectification of these defects when Brampton
- B raised the complaints before the end of the defects liability period. Further, Isyoda and Brampton had agreed on the cost of such rectification in the settlement agreement (see paras 94–95 & 97).
- C (7) In respect of the step chain rollers, the claim was not proved. There were 52 elevators at the site, and Brampton only owned 28 of those elevators. There was actually no evidence as to which of the 52 escalators had the problem complained of. There was also no evidence that the defects complained of were indeed due to manufacturing defects. The damage or defect complained of was actually part of 'wear and tear' (see para 102).

D

[Bahasa Malaysia summary]

- E Plaintiff merupakan pakar eskalator. Melalui surat award bertarikh 27 November 2006, Brampton Holdings Sdn Bhd ('Brampton') telah melantik defendan, Isyoda (M) Sdn Bhd ('Isyoda') sebagai reka bentuk serah kunci dan bangunan kontraktor berkenaan satu projek pembangunan. Satu perjanjian rasmi bertarikh 11 Disember 2006 telah kemudiannya disediakan untuk memberi kesan yang sama ('kontrak utama'). Pada 14 Disember 2006, Isyoda diawardkan kontrak kepada Sigma sebagai subkontraktor bagi perkhidmatan pengangkutan menegak yang diperlukan dalam projek itu
- F ('subkontrak'). Pada 8 Ogos 2010, Isyoda juga mengarahkan Sigma untuk menjalankan kerja-kerja tambahan dengan nilai RM55,575. Brampton tidak mempunyai pengetahuan tentang kerja-kerja tambahan tersebut. Pada 1 Oktober 2010, Brampton mengambil alih projek tersebut. Isyoda dan Brampton memasuki dua perjanjian tambahan pada 15 Jun 2011 untuk menyelesaikan pertikaian yang telah timbul antara Isyoda dan Brampton. Salah satu pertikaian adalah perkara pembayaran kepada Sigma. Sigma mendakwa bahawa ia telah menyiapkan kerja-kerja di bawah subkontrak dan bahawa ia tidak dibayar sepenuhnya. Sigma menuntut jumlah RM1,180,291.52 yang kena dibayar di bawah subkontrak dan sebanyak
- H RM1,389.38 yang kena dibayar untuk kerja-kerja tambahan. Isyoda enggan membayar RM1,180,291.52 di bawah subkontrak dengan memberikan beberapa sebab, seperti berikut: (a) bahawa di bawah klausa 3.0 daripada subkontrak, Sigma hanya berhak mendapat bayaran selepas Isyoda menerima bayaran dari Brampton. Oleh sebab Isyoda telah tidak diterima daripada
- I Brampton bayaran yang dituntut oleh Sigma, Isyoda menegaskan bahawa tidak terdapat tanggungjawab ke atas Isyoda untuk membayar Sigma; (b) melalui surat bertarikh 11 Oktober 2012, Sigma telah bersetuju untuk melepaskan Isyoda daripada obligasinya untuk membayar Sigma dan telah menyetepikan semua wang yang kena dibayar dan terhutang oleh Isyoda

bawah subkontrak (surat pelepasan dan pengecualian); dan (c) bahawa dengan surat pelepasan dan pengecualian dan perjanjian penyelesaian bertarikh 4 Februari 2013 ('PA'), ia telah dipersetujui antara Sigma, Isyoda dan Brampton bahawa semua wang yang kena dibayar dan terhutang di bawah subkontrak akan dibayar oleh Brampton terus kepada Sigma. Isyoda memulakan prosiding pihak ketiga terhadap Brampton menuntut tanggung rugi terhadap Brampton. Brampton menafikan bahawa ia telah bersetuju untuk menanggung rugi Isyoda dalam perjanjian tambahan. Brampton juga membuat tuntutan balas atas alasan bahawa eskalator itu cacat dalam dua aspek. Kecacatan pertama berkenaan penggelek langkah dan penggelek rangkaian langkah; dan kecacatan kedua adalah bahawa pendaratan banyak daripada 52 eskalator tidak melimpah dengan lantai supaya pendaratan eskalator adalah lebih tinggi daripada lantai.

Diputuskan, membenarkan tuntutan Sigma dan menolak tuntutan balas Isyoda dan Brampton dengan kos:

- (1) Subkontrak itu mengandungi semua terma dan syarat mengawal hubungan Sigma dan Isyoda. Oleh kerana Sigma telah diambil bekerja oleh Isyoda, ia adalah Isyoda yang perlu membayar untuk semua perkhidmatan dan kerja yang dilakukan oleh Sigma (lihat perenggan 29).
- (2) Isu atau pembelaan untuk pembayaran apabila dibayar di bawah subkontrak tidak ada kepada Isyoda. Di bawah terma perjanjian penyelesaian, Isyoda tidak akan dibayar oleh Brampton untuk kerja yang dilakukan oleh Sigma kerana Brampton perlu membayar Sigma secara terus manakala hujah untuk perjanjian yang berbalik kepada perjanjian itu adalah bahawa Isyoda hanya akan membayar Sigma apabila ia dibayar oleh Brampton. Isyoda tidak dapat berpegang kepada kedua-dua hujah yang tidak konsisten antara satu sama lain itu (lihat perenggan 34).
- (3) Surat pelepasan dan penepian hanya mempunyai tandatangan Sigma. Kedua-dua Brampton dan Isyoda tidak menandatangani surat itu. Meletakkan tandatangan oleh pihak yang mengkontrak adalah penting dan material kerana ia menandakan persetujuan dan komitmen kepada terma-terma seperti yang terdapat dalam dokumen relevan yang mana tandatangan itu didapati. Apabila Isyoda meminda surat pelepasan dan penepian itu dan bukan menandatangani, ia menunjukkan bahawa kedua-dua pihak sebenarnya tidak mencapai apa-apa *consensus ad idem* berhubung perkara itu. Berdasarkan ketiadaan persetujuan itu, Isyoda tidak mungkin boleh bergantung kepada surat pelepasan dan penepian yang Isyoda sendiri ingin pinda; dan tidak menandatangani (lihat perenggan 47).
- (4) PA itu berhasrat untuk menamat dan menyelesaikan semua pertikaian antara Brampton dan Isyoda. Ia merupakan perjanjian yang tidak melibatkan Sigma. Tanpa apa maksud ia adalah perjanjian tiga pihak di

- A hadapan mahakamh di mana ia telah dipersetujui bahawa Sigma hendaklah dibayar terus oleh Brampton. Kewujudan PA tidak membebaskan Isyoda daripada tanggungjawabnya untuk membayar Sigma untuk kerja yang dilakukan di bawah subkontrak itu. Bagi itu, Isyoda masih bertanggungjawab di bawah subkontrak itu untuk
- B membayar Sigma bagi kerja yang Sigma telah siap (lihat perenggan 60–62).
- (5) Perjanjian Isyoda dengan Brampton adalah Brampton akan membayar Sigma terus tidak melepaskan Isyoda daripada tanggungjawabnya untuk
- C membayar Sigma. Ini adalah kerana Sigma bukan pihak kepada urusan di bawah PA itu (lihat perenggan 64).
- (6) Sigma tidak bertanggungjawab untuk kecacatan pendaratan eskalator itu. Peranan Sigma hanya untuk membekal dan memasang eskalator menurut spesifikasi yang terkandung dalam lukisan kedai yang
- D diluluskan. Kerja untuk memastikan eskalator tersebut setara dengan rantai adalah sebahagian daripada kerja kemasan yang terangkum dalam skop kerja Isyoda. Walau bagaimanapun, Isyoda juga bertanggungjawab untuk kecacatan tersebut. Isyoda telah membuat cadangan yang perlu
- E berhubung pembedulan kecacatan tersebut apabila Brampton menimbulkan aduan sebelum tamat tempoh tanggungjawab kecacatan. Selanjutnya, Isyoda dan Brampton telah bersetuju tentang kos pembedulan tersebut dalam perjanjian penyelesaian (lihat perenggan 94–95 & 97).
- F (7) Berhubung langkah rantaian pengelek, tuntutan itu tidak dibuktikan. Terdapat 52 eskalator di laman web, dan Brampton hanya memiliki 28 daripada eskalator tersebut. Sebenarnya tiada keterangan tentang yang mana satu daripada 52 eskalator mempunyai masalah yang diadukan itu.
- G Terdapat juga tiada keterangan bahawa kecacatan yang diadukan sememangnya disebabkan oleh kecacatan pembuatan. Kerosakan atau kecacatan yang diadukan itu sebenarnya sebahagian daripada ‘wear and tear’ (lihat perenggan 102).]

H Notes

For a case on payment, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4028.

Cases referred to

- I *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2014] 5 CLJ 533, CA (refd)
- Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 5 MLJ 145; [2014] 7 CLJ 1, FC (refd)
- Tsang Yee Kwan v Majlis Perbandaran Batu Pahat* [2011] 8 CLJ 913, CA (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 s 35

Deepak Mahadevan (Brian Sim Boon Lian with him) (Azmi Fadzly, Maha & Sim) for the plaintiff.

Sashiraj Uthrapathy (James Joshua Paulraj with him) (Raj, Ong & Yudista) for the defendant.

Chong Poh Ken (Ong, Chong & Tan) for the third party.

Mary Lim J:

[1] The plaintiff's claim is for balance payments for work done. The defendant denies liability claiming, inter alia, that the payment should be made by the third party. The third party similarly denies liability; and it counterclaims damages for defective work. This led the defendant to counterclaim against the plaintiff for the same. The plaintiff has denied that its work is defective.

CHRONOLOGY OF MATERIAL EVENTS

[2] The plaintiff, Sigma Elevator (M) Sdn Bhd ('Sigma'), are elevator specialists. By letter of award dated 27 November 2006, Brampton Holdings Sdn Bhd ('Brampton') appointed the defendant, Isyoda (M) Sdn Bhd ('Isyoda') as the main turnkey design and building contractor in relation to the development project of three plots of land at Jalan Loke Yew now known as 'Kompleks Metro Pudu'. A formal agreement dated 11 December 2006 was subsequently drawn up to the same effect ('main contract').

[3] On 14 December 2006, Isyoda awarded a contract to Sigma as a subcontractor for vertical transportation services required in the project for a total contract price of RM8,935,000 ('the subcontract'). On 8 August 2010, Isyoda also instructed Sigma to carry out additional works to the value of RM55,575. Brampton has no knowledge of these additional works.

[4] On 1 October 2010, Brampton took possession of the project except for one lot at grid 11 relating to an external car park. On 6 October 2010, a statement of partial possession of the project was issued by Brampton to Isyoda confirming that all works have been completed and handed over, save for the car park mentioned earlier. With this issuance, the defects liability period ('DLP') which commenced on 1 October 2010 expires on 30 March 2012.

[5] Isyoda and Brampton entered into two supplemental agreements on 15 June 2011. The first related to the main contract (issues supplemental agreement) while the other dealt with the mechanical and engineering works

A executed by the subcontractors (M&E supplemental agreement). On 4 February 2013, the same parties entered into a settlement agreement. All these agreements relate to the settlement of disputes that had arisen between Isyoda and Brampton, including the matter of payments to subcontractors such as Sigma.

B THE COMPETING CLAIMS RESPONSES

Sigma's claim

C [6] Sigma claims that it has completed the works under the subcontract; but that it has not been fully paid. Its claim against Isyoda is for outstanding payments; a sum of RM1,180,291.52 due under the subcontract and a sum of RM1,389.38 due for additional works.

D *Isyoda's defences*

E [7] Isyoda does not dispute that there is a balance sum of RM1,389.38 which is still unpaid for such work and for which it is liable. It, has, however, refused to pay the RM1,180,291.52 under the subcontract. It claims that it is not obliged to pay Sigma the outstanding amount under the subcontract for several reasons.

F [8] First, under cl 3.0 of the subcontract, Sigma is only entitled to payment after Isyoda received payment from Brampton. Since Isyoda has not received from Brampton the payment claimed by Sigma, there is no obligation on Isyoda to pay Sigma.

G [9] Second, vide letter dated 11 October 2012, Sigma had agreed to release Isyoda from its obligations to pay Sigma and had waived all sums due and owing by Isyoda under the subcontract (letter of release and waiver). By this letter, Sigma and Isyoda have mutually agreed that the parties would no longer be bound by the terms and conditions of the subcontract.

H [10] Third, by this letter of release and waiver; statutory declaration dated 15 October 2012 signed by Sigma's Managing Director; emails dated 23 October 2012; settlement agreement dated 4 February 2013; and a meeting on 9 May 2014, it was also agreed between Sigma, Isyoda and Brampton that all sums due and owing under the subcontract will be paid by Brampton directly to Sigma. According to Isyoda, although Isyoda had requested amendments to the Settlement Agreement to include matters concerning defects in the escalators complained of by Brampton, Sigma had insisted upon parties adhering to the terms found in the letter of release and waiver.

I

Third party claim

A

[11] Just prior to its filing of defence and counterclaim, Isyoda commenced third party proceedings against Brampton. In the third party notice, Isyoda sought an indemnity against Brampton and asked that the question of whether Isyoda is liable to pay Sigma for the outstanding sum be resolved not between itself and Sigma but between Sigma and Brampton.

B

[12] In its statement of claim against Brampton, Isyoda referred, inter alia, to two supplemental agreements, both dated 15 June 2011 that the parties made besides the letter of award in relation to the main contract. In the supplemental agreements, Brampton is alleged to have, inter alia, agreed to indemnify and release Isyoda from all liabilities arising under the subcontract. Further, Isyoda alleged that Brampton had acknowledged that Sigma is owed a balance amount of RM1,180,291.52.

C

D

[13] Isyoda also relies on the letter of release and waiver where all three parties, namely Sigma, Isyoda and Brampton are said to have agreed to mutually vary both the main contract and the subcontract in that Brampton will, inter alia, pay directly to Sigma the balance amount. That variation was also brought about by settlement agreement dated 4 February 2013 in which Brampton and Isyoda further agreed that Brampton will save harmless Isyoda from all claims made by Sigma pursuant to the subcontract but limited to the balance sum.

E

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Brampton's defences and counterclaim

[14] In defence to this third party action, Brampton denied that it had agreed to indemnify Isyoda in the supplemental agreements. In any case, the supplemental agreements are said to have been superseded by the settlement agreement dated 4 February 2013 made between Brampton and Isyoda. Brampton further pleaded that it did not agree to a tripartite agreement to be made between Sigma, Isyoda and itself; and that it never agreed to any variation of the main contract or the subcontract, as alleged by Isyoda.

G

H

[15] As for the settlement agreement, Brampton claimed that although it is provided that Brampton shall liaise with the M&E subcontractors, including Sigma with a view to having defects of the subcontract rectified, and to make direct payments to Sigma of the balance sum, the payment was always subject to the following conditions:

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- (a) Brampton's right to make deductions necessary for unrectified works;

- A (b) Isyoda was to assign all its rights, interests, remedies and benefits under the five M&E subcontracts so that Brampton could enforce those subcontracts in Isyoda's name;
- B (c) where requested and directed by Brampton, Isyoda was to take all necessary steps and action to enforce the M&E subcontracts for the benefit of Brampton; and
- (d) Isyoda remains liable for all latent defects in and of the project.
- C [16] Brampton claims that there were latent defects in the escalators installed; and it has counterclaimed for the rectification of the defects; for an indemnity against all and any claims by purchasers, owners, occupiers, workmen, invitees, visitors of Kompleks Metro Pudu in respect of all and any loss or damage caused by or related to the escalator landing defects and escalator defects.
- D
- E [17] Brampton further denies that it is under any obligation to indemnify Isyoda as Isyoda is itself in breach of the settlement agreement when it failed to take all necessary steps and action to enforce its rights and remedies under the M&E subcontracts for Brampton's benefit; including ensuring that Sigma rectify the defects complained of.
- F [18] As for the settlement agreement, Brampton denies that it is a variation but a final settlement between the parties providing for their respective duties and obligations.
- Isyoda's reply and defence to Brampton's counterclaim and counterclaim against Sigma*
- G [19] Isyoda has denied Brampton's claims and suggesting them to be mere afterthoughts. Isyoda also claimed that Brampton is estopped from raising the issues of defects by reason of its agreement to pay for defects in February 2013; and because on 29 April 2013, Isyoda wrote to Brampton stating that all defects had been rectified.
- H [20] Isyoda has nevertheless counterclaimed against the plaintiff alleging that Sigma is responsible for the defects encountered by Brampton given that the relevant works were executed by Sigma under the subcontract.
- I *Sigma's defence to Isyoda's counterclaim*
- [21] In substance, Sigma denies responsibility for both defects. Sigma claims to have attended to the defects that had been brought to its notice during the defects liability period; and that everyone was satisfied with the rectifications.

ISSUES

A

[22] Two central issues emerged from the pleadings and were agreed for determination at the full trial:

- (a) who is liable an obligation to pay the outstanding subcontract sum of RM1,180,291.52 to Sigma? And, whether Isyoda can rely on the indemnity provision in the settlement agreement between Isyoda and Brampton? B
- (b) whether there are any defects in the escalator works carried out by Sigma? And, if so, who is liable to rectify the defects? C

[23] It was further agreed that in view of these central issues, Isyoda will lead evidence in relation to the first issue whereas Brampton will lead in relation to the second issue. Sigma will consequently assume the role of defendant in response to both issues. This course of trial proceedings is viable and practical as the amount of Sigma's claim is really not in dispute; just who is responsible for that payment; and whether there should be any deduction of payment for rectification works to the escalators. D

[24] A total of seven witnesses testified. Isyoda called two witnesses, namely Tan Kok An, its executive director ('DW1') and, Soh Yoke Yan, its director of finance ('DW2'). Brampton also called two witnesses, Tan Yee Wei ('TPW1'), Building Manager of Kompleks Metro Pudu JMB; and Lim Loke Choy ('TPW2'); a Director of Brampton as well as the Chairman of Kompleks Metro Pudu JMB. Sigma called three witnesses, Hardeep Kaur a/p Harbans Singh ('PW1') who is Sigma's contract manager; Rabindra a/l Belaetham ('PW2'), Sigma's senior service sales engineer; and Ngu Kee Hing ('PW3'), Sigma's managing director. E

Who is liable an obligation to pay the outstanding subcontract sum of RM1,180,291.52 to Sigma? And, whether Isyoda can rely on the indemnity provision in the settlement agreement between Isyoda and Brampton? F

[25] These are the competing arguments of the three parties. G

[26] Isyoda contends that Brampton is liable to pay Sigma by reason of the letter of release and waiver, the terms of the settlement agreement dated 4 February 2013; and the conduct of the parties. Isyoda contends that this intention and agreement of the parties that Brampton is to pay Sigma is evident from all three pieces of evidence. H

[27] Brampton contends otherwise. It claims it is not a party to any of the two underlying contracts between Sigma and Isyoda; the underlying contracts I

- A being the subcontract and the additional works contract. The only contracting parties there are Isyoda and Sigma. Hence, Brampton cannot be liable as there is no privity of contract between Brampton and Sigma. See the Court of Appeal's decisions in *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2014] 5 CLJ 533; and *Tsang Yee Kwan v Majlis Perbandaran Batu Pahat* [2011] 8 CLJ 913.
- B

- [28] Sigma takes a similar position; contending that its arrangements are with Isyoda and that it is Isyoda who is to pay. Under cl 3 of the subcontract, Isyoda is obliged to pay Sigma all progress payments within 14 days of receipt of all progress payments from Brampton. Sigma claims that although the parties had some intention of altering the position of the legal obligation to pay Sigma for the works under the subcontract, this was not followed through.
- C

- [29] The determination of this first issue must surely start with the basic contractual arrangements between the parties. That basic arrangement must be that which is housed in the subcontract. This subcontract contains all the terms and conditions governing the relationship of Sigma and Isyoda. Since Sigma was engaged by Isyoda, it is Isyoda that has to pay for all services and work rendered by Sigma. Quite evidently, and as testified by PW1, and indirectly confirmed by DW1, Isyoda is obliged to pay Sigma for all work done.
- D
- E

- [30] The next issue is whether this position is in any way altered by the arguments raised by Isyoda; that is the operation of cl 3.0 of the subcontract; the presence of the letter of release and waiver; settlement agreement dated 4 February 2013; and the various correspondence and meetings held between the parties that Isyoda is released from its obligations under the subcontract to pay Sigma and that it is Brampton that now has to pay Sigma directly.
- F

- [31] Dealing first with the matter of cl 3.0 of the subcontract, Isyoda is in effect relying on what is often described as a back to back clause. The object of Isyoda's submissions in this respect is to say that until and unless Isyoda is paid, there is no obligation to pay Sigma. Since Isyoda has not been paid, Isyoda does not have to pay Sigma.
- G

- [32] To this, Sigma claims that cl 3.0 is void under s 35 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012'). Isyoda contends otherwise. Isyoda contends that paid if paid clauses are outlawed whereas pay when paid clauses which merely alludes to the time of payment are not void. This was the view of the Federal Court in *Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd* [2014] 5 MLJ 145; [2014] 7 CLJ 1.
- H
- I

[33] I must express some difficulties I have with Isyoda's argument and reliance on this back to back clause as there appears to be some conflicting

positions taken by Isyoda. The conflict arises from Isyoda's argument that there is an agreement for direct payment by Brampton to Sigma under the settlement agreement.

A

[34] Now, assuming that argument is valid, I cannot see how the issue or defence of pay when paid under the subcontract is still available to Isyoda. Under the terms of the settlement agreement, Isyoda will never be paid by Brampton for work done by Sigma since Brampton is to pay Sigma directly whereas the argument of a back to back agreement is that Isyoda will only pay Sigma when it is paid by Brampton. It therefore would appear that Isyoda cannot hold on to both arguments which are inconsistent with one another.

B

C

[35] Upon clarification, this issue or defence on back to back payment was abandoned after learned counsel for Isyoda took instructions from his client. I no longer need to consider the point under cl 3.0 of the subcontract.

D

[36] Moving next to the letter of release and waiver dated 11 October 2012, this is that letter:

Date: 11 October 2012

E

BRAMPTON HOLDINGS SDN BHD

3A-12, Service Apartment

Kompleks Metro Pudu

No. 1, Jalan Metro Pudu 2

Fraser Business Park

F

Off Jalan Yew

55200 Kuala Lumpur

ISYODA (M) SDN BHD

G

Wisma Isyoda

No. 9, Jalan 1/68E

Off Jalan Sentul Manis

51000 Kuala Lumpur

H

Dear Sir

CADANGAN PEMBANGUNAN ENTERPRISE KOMERSIAL DAN PERDAGANGAN (PARCEL B) YANG MENGANDUNGI 'RETAIL SUPERMART, FOOD COURT DAN CAFÉ, TECHNO CENTRE' DAN 'MEGA TUTORIAL' DI TINGKAT SUB-BASEMEN HINGGA TINGKAT 7; 'PANGSAPURI SERVIS (251 YUNIT)' DI TINGKAT 4 HINGGA 14, 'HOSTEL' (950 UNIT) DI TINGKAT 8 HINGGA 14; TEMPAT LETAK KERETA DI TINGKAT BASEMEN DAN SUB-BASEMEN DI ATAS SEBAHAGIAN LOT 365, 262 & 174, SEKSYEN 92, JALAN LOKE YEW, DALAM BANDARAYA KUALA LUMPUR ('Project')

I

- A** - Owner/Developer : Brampton Holdings Sdn Bhd
- Main Contractor : Isyoda (M) Sdn Bhd
- Sub-Contractor : Sigma Elevator (M) Sdn Bhd
- Sub-Contractor No. : ISB/F&N/M&E/001
- B** - Sub-Contractor Works : Vertical Transportation Services
We refer to the above Project where we have been appointed as a sub-contractor by Isyoda (M) Sdn Bhd by way of the Sub-Contract.
We acknowledge that there is a sum of RM1,180,291.52 which is due and owing to us under the Sub-Contract.
- C** We hereby agree to comply with the instructions and supervision of Brampton Holdings Sdn Bhd who has agreed to pay us all sums that are due and owing under the Sub-Contract. We also agree to hold Brampton Holdings Sdn Bhd Liable for payment of all outstanding payments under the Sub-Contract instead of Isyoda (M) Sdn Bhd.
- D** We hereby fully and forever release Isyoda (M) Sdn Bhd from all and any liability to us whatsoever and howsoever arising from or in connection with the Sub-Contract and the Project.
- E** Thank you.
Yours faithfully
For SIGMA ELEVATOR (M) SDN BHD
– signed –
- F** _____
LEE BUAN SING
Managing Director
We, BRAMPTON HOLDINGS SDN BHD
- G** agree to the above arrangement
.....
Director
We, ISYODA (M) SDN BHD
- H** agree to the above arrangement
.....
Director

- I** [37] Although the contents of the letter of release and waiver do provide that Isyoda is to be released from all its obligations, it is equally clear that the letter is not signed. The letter of release and waiver provides for all three parties to sign. While the absence of signatures does not necessarily mean there is no binding agreement, the reason why the three signatories have not signed must be examined together with the question of whether their signatures was

required at all in the first place. The circumstances surrounding the preparation and the issue of the letter of release and waiver would also be relevant.

A

[38] This is what led to the issuance of such a letter as told by Tan Kok An ('DW1') Isyoda's executive director and director in charge of construction.

B

[39] DW1 testified that Brampton had indicated that the M&E subcontractors had requested direct payments from Brampton instead of waiting to be paid by Isyoda as far back as August 2011. The offer for direct payment to Sigma came from both Isyoda and Brampton. This offer was accepted by Sigma who signified its agreement by signing the letter. DW1 told the court that there 'was no necessity for Isyoda or Brampton to sign and return the letter of waiver. In fact we wanted to have the letter amended, but Sigma was insistent that they would maintain their agreement based on their letter of waiver already signed'.

C

D

[40] DW1 also testified that Isyoda did not sign because 'an agreement was reached already. The intentions of the parties were clear'. While he 'must admit that the documentation regarding this is not ideal' he was of the view that 'the agreement is there'. DW1 further relied on the contents and language of the letter of release and waiver as signifying the clear intention of the parties, that Isyoda was discharged by this letter.

E

[41] Hardeep Kaur a/p Harbans Singh (PW1'), Sigma's contract manager testified specifically on the letter of release and waiver. At the material time, she, Hardeep, was the assistant manager credit control, She personally assisted the former managing director, Mr Lee Buan Sing ('Mr Lee') in most of the negotiations and correspondence with Isyoda on the preparation of the letter as well as in the settlement meetings between all three parties.

F

G

[42] Hardeep testified that it was DW1 who approached Mr Lee. DW1 wanted to know if Sigma would be agreeable to execute a letter of release and waiver to confirm that Brampton would make payment directly to Sigma and be liable for all outstanding sums to Sigma under the Sigma's subcontract. This would result in Sigma releasing Isyoda from any liability arising from the subcontract. According to Hardeep, Sigma 'was prepared to agree to this arrangement subject to all parties (ie defendant and third party) executing the letter of release and waiver which will form a tripartite agreement'.

H

I

[43] Mr Lee discussed with Hardeep the draft letter of release and waiver sent by Isyoda. Hardeep made certain amendments as requested by Mr Lee and then returned the amended draft to Isyoda. The amended draft is at pp 896–897 of CBD4. Isyoda accepted these changes and returned a clean

- A copy for Sigma's signature. Sigma executed and signed the letter of release and waiver using its letterhead on 11 October 2012. The signed copy was sent to Isyoda on 15 October 2012.
- B [44] However, on 23 October 2012, DW1 contacted Mr Lee regarding further changes to the letter of release and waiver. The changes proposed by Isyoda required Sigma to agree for Brampton to be entitled to hold back payment and deduct the balance sum due or part thereof if Sigma failed to complete its defects rectification. This is reflected at pp 987–990 of CBD4.
- C [45] Sigma refused as it took the position that all parties had already agreed that all defects had been completed within the defects liability period; and that period expired on 30 March 2012. By this time, October 2012, the rectification of defects was a closed issue so Hardeep accordingly, prepared a reply to this effect — see letter dated 31 October 2012 at p 906 of CBD4.
- D [46] It is obvious that the letter of release and waive bears only the signature of Sigma. Both Brampton and Isyoda did not sign the letter. Isyoda argues that its signature is immaterial or unnecessary whereas Sigma says otherwise.
- E [47] In my judgment, the affixing of a signature by the contracting party is important and material as it signifies agreement and commitment to the terms as appearing in the relevant document upon which the signature appears. To me, when Isyoda amended the letter of release and waiver instead of signing it,
- F it shows that both parties have actually not reached any *consensus ad idem* on the matter. In the face of such non-agreement, I cannot see how Isyoda can possibly rely on the letter of release and waiver which Isyoda itself wanted amended; and had not signed.
- G [48] When Sigma signed the letter of release and waiver, it was on Isyoda's assurance that it would form a tripartite agreement. Isyoda was to procure Brampton's signature on that letter of release and waiver. Hardeep told the court that Sigma 'made it clear to the defendant that until and unless the R&W letter was duly signed by both the defendant and the third party, the plaintiff
- H will not be bound to the R&W letter and will continue to look towards the defendant for payment of the balance debt'. Isyoda did not respond to this letter from Sigma.
- I [49] Sigma's particular requirement of a tripartite agreement is not a bare averment but, a real and substantial defence. In fact, it is indirectly corroborated by DW1's testimony. DW1 referred to a meeting on 9 May 2014 between all three parties. At that meeting the minutes of which can be found at p 575 of CBD3, it is recorded that a tripartite agreement was initially proposed to formalise the direct payments to some of the M&E subcontractors, which

would include Sigma. This proposal was subsequently dropped and replaced by the settlement agreement found at p 539 CBD3. I must immediately reject any suggestion that the settlement agreement signed one a half years after Sigma had signed the letter of release and waiver is the tripartite agreement that the parties, especially Sigma, required from Isyoda.

A

B

[50] As testified by PW1, not only was the signature of Isyoda required, Brampton's signature was equally important. PW1 told the court that Sigma had made it clear that it wanted a tripartite arrangement and its consent and agreement to the letter of waiver were on those terms. Likewise, its signature. It is however, evident that Brampton was not prepared to enter into such a tripartite arrangement seeing it as a convoluted and complicated exercise that it was not comfortable with. TPW2 has testified to this effect. This letter was also not forwarded to Brampton for its signature as Isyoda had proposed amendments even before it could be sent to Brampton for signature.

C

D

[51] I am satisfied from the evidence before me that Sigma required a tripartite agreement and that its requirement would be manifested in signatures of all three parties being affixed to the letter. In fact, the letter itself provides for the signatures of all three. If signatures are as unimportant as suggested by Isyoda, it is puzzling to see why there is even provision for three or even one signature in the first place. Isyoda's contentions therefore are quite untenable.

E

[52] Under the circumstances, the subcontract remains very much the governing contract between Isyoda and Sigma. When Sigma refused to agree to Isyoda's amendments and insisted on using the earlier drafts, Isyoda itself did not sign the letter of release and waiver. I cannot see how Isyoda can now argue that there is agreement, but on the old terms. I am inclined to agree with Sigma's contention that this line of argument is more in the nature of an afterthought especially because there is no indication from Isyoda at the material time that this was the option or outcome.

F

G

[53] Even though Sigma had insisted on the earlier version of the letter of release and waiver, which Isyoda now seeks to rely on, it does not alter the fact that Sigma's assent to that letter was on terms, that is, all three parties must sign. That element remains wanting.

H

[54] In the circumstances, the letter of release and waiver is not enforceable as there was no conclusion or agreement on the matters set out in the letter.

I

- A [55] Moving then to the settlement agreement; the question is whether Isyoda can rely on the indemnity provision in the settlement agreement as discharging its obligations to pay Sigma. Isyoda argues that it is discharged while Brampton disagrees.
- B [56] The settlement agreement ('SA') was entered between Brampton and Isyoda on 4 February 2013 (pp 539–545 CBD3). Earlier, these same parties had entered into supplemental agreements on 15 June 2011 (see pp 493–510 of CBD3). DW1 claimed the SA varied the earlier supplemental agreements and the main agreement; discharging Isyoda from its obligations to pay Sigma
- C and that it is Brampton who has to pay Sigma. According to DW1, Brampton acknowledged in the SA that the sum of RM1,180,291.52 was the final sum payable to Sigma. By cl 11 of the SA, Brampton is also said to have agreed to indemnify and hold harmless Isyoda from all claims made by Sigma, limited
- D always to that final sum stated.
- [57] Soh Yoke Yan ('DW2') who signed the supplemental agreements and the SA testified that Brampton had agreed to pay Isyoda the sum of RM9,247,963.45 as full and final settlement of all the various works. This was
- E the final sum agreed between the parties and mentioned in the SA. This sum was arrived at after taking into account the amount that is presently claimed by Sigma and the details are to be found at p 1065 of CBD4. The sum had also taken into account the cost of defective works (see pp 992–994 of email dated 23 October 2012).
- F
- [58] On the other hand, TPW2 testified that before this SA came about, the parties including their related parties were involved in a few suits. Brampton and Isyoda 'then decided to have a global settlement of all these suits and the settlement agreement was the result of this global settlement'. TPW2 denies
- G that it is obliged to pay Sigma for the sum claimed here. According to TPW2, Brampton is only obliged to make direct payments to Sigma when defects of work done have been rectified. Since the defects have not been rectified, Brampton is not liable.
- H
- [59] Brampton further argued that it is not obliged to indemnify Isyoda because Isyoda has failed to take all necessary steps and action to enforce its rights and remedies against Sigma for Brampton's benefit.
- I [60] Having examined the SA, Brampton's explanations on how the SA came to pass is borne out by the contents of the SA. It is obvious from the recitals in the SA and reading the SA as a whole that the SA was intended to end and settle all disputes between Brampton and Isyoda. The details of the settlement are well set out in the SA.

[61] It is equally obvious from the SA that it is an agreement that does not involve Sigma. By no means is it a tripartite agreement between the three parties before the court where it was agreed that Sigma is to be paid directly by Brampton. It is simply an agreement reached between Isyoda and Brampton for the purpose of a 'global' settlement of the then pending disputes between the parties. The parties did not include Sigma directly as a contracting party. Nevertheless, it affects Sigma indirectly as a party who would stand to benefit, as the SA does provide for direct payments to Sigma for work it has done.

A

B

[62] Be that as it may, the existence of the SA does not absolve Isyoda from its obligations to pay Sigma for work done under the subcontract. For that, Isyoda remains very much liable under the subcontract to pay Sigma for work that Sigma has completed.

C

[63] It is quite apparent from the terms of the SA that Brampton's agreement with Isyoda that it will pay directly to Sigma and the other subcontractors is subject to its right to make deductions for defects which are not rectified, and to the financial limits stipulated in cl 11. Where the requisite conditions precedent are met; yet, Brampton fails to make any payment directly to Isyoda, Isyoda may have a claim for indemnity against Brampton.

D

E

[64] Isyoda's agreement with Brampton that Brampton will pay Sigma directly does not discharge Isyoda from its obligations to pay Sigma. This is because Sigma is not a party to the arrangements under the SA. If it were otherwise, Isyoda may perhaps make some valid argument along that vein. On its own and without more, I cannot see how Isyoda's argument that it is not liable to pay Sigma is of merit.

F

[65] However, Isyoda may claim its rights under the SA to be indemnified by Brampton. For Isyoda to credibly argue that the right of indemnity has been triggered, Sigma must first of all, claim from Isyoda. Without Sigma claiming from Isyoda, the right to be indemnified just does not arise. This is how the parties have chosen to arrange their affairs; that Isyoda's rights against Brampton is only in the nature of an indemnity. A claim by Sigma is therefore required and Isyoda is obliged to pay first before it can turn to Brampton for indemnity. Isyoda's payment to Sigma is necessary as it then reflects Isyoda's loss which Brampton has promised to save harmless by way of an indemnity.

G

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[66] This conclusion may be reasonably deduced from a reading of cll 11–12 of the SA:

I

Direct Payments and Indemnities

11. Brampton shall directly liaise with the M&E Subcontractors and CP Consultants Pte. Ltd. with a view to rectifying those defects in respect of the M&E

- A** Works of the Project and shall make direct payment to them of those sums remaining due under the M&E Subcontracts and the Consultancy Contracts as follows:
- (a) the sum of RM102,978.42 due to Enmac Sekutu Sdn Bhd;
- B** (b) the sum of RM1,180,291.52 due to Sigma Elevator (M) Sdn Bhd;
- (c) the sum of RM2,521,043.96 due to Bond M&E (KL) Sdn Bhd;
- (d) the sum of RM1,268,402.43 due to GAE Technical Services Sdn Bhd;
- C** (e) the sum of RM80,422.23 due to Duodex Engineering & Trading Sdn Bhd; and
- (f) the sum of RM3,620,891.65 due to CP Consultants Pte. Ltd.
- subject always to the right of Brampton to make any deductions necessary due to unrectified works.
- D** 12. Brampton shall indemnify and save harmless Isyoda from all and any claims made by the M&E Subcontractors, CP Consultants Pte Ltd, or any of them whatsoever and howsoever. However, the liability of Brampton under this clause in respect of claims made by the M&E Subcontractors and CP Consultants Pte. Ltd. shall be limited to those amounts respectively remaining due to them as stated in
- E** clause 11 above.

[67] Clause 11 provides for Brampton to make direct payments to subcontractors such as Sigma. As pointed out earlier, such obligation is on terms including Isyoda's obligation to rectify defects. Where Isyoda does not rectify, Brampton has a right to deduct for such rectification costs. Under cl 12, Brampton has further agreed that it will indemnify Isyoda in the event of any claims by subcontractors such as Sigma.

- G** [68] On the matter of defects, cl 11 must be read together with cll 4–5. These two clauses deal specifically with the matter of defects:

Latent Defects

- H** 4. Notwithstanding clauses 1, 2 and 6 Isyoda will remain liable to the extent allowed under the Main Contract for all latent defects (with the exception of M&E Works for which Isyoda will no longer be liable) in and of the Project for which Isyoda is responsible under the terms of the Main Contract.
- I** 5. Isyoda hereby assigns all its rights and benefits and remedies in to and under the M&E Subcontracts to Brampton so that Brampton shall be entitled to enforce the M&E Subcontracts in Isyoda's name and Isyoda shall, upon Brampton's request and direction, take all necessary steps and action as permitted by law and/or under the M&E Subcontracts to enforce its rights and remedies under the M&E Subcontracts for the benefit of Brampton. All such steps taken by Isyoda at Brampton's request shall be at Brampton's costs. Brampton hereby agrees to indemnify Isyoda against any and all losses, damages, costs and expenses that Isyoda may sustain or suffer that

are due to Isyoda's compliance with this clause and which are not in any way due to Isyoda's negligence default and/or omission of Isyoda's duties under the M&E Subcontracts or the Main Contract.

A

[69] Isyoda's arguments on cll 4 and 5 are two-fold. Under cl 4 of the SA, Isyoda remains liable for all latent defects 'in and of the project' save for defects which are related to M&E works. Since Sigma's work on the escalators is said to fall within such works, Isyoda's argument is that it is no longer liable for any latent defects related to the escalators.

B

[70] Secondly, where M&E works are concerned, the parties have agreed in cl 5 that Isyoda is to assign 'all its rights and benefits and remedies in to and under the M&E Subcontracts to Brampton so that Brampton shall be entitled to enforce the M&E Subcontracts in Isyoda's name'. By reason of this assignment, 'Isyoda shall, upon Brampton's request and direction, take all necessary steps and action as permitted by law and/or under the M&E Subcontracts to enforce its rights and remedies under the M&E Subcontracts for the benefit of Brampton'.

C

D

[71] Learned counsel for Brampton submits that Isyoda remains liable under both clauses; because the defects complained of here are latent defects; and because Isyoda has failed to enforce rights and remedies under the subcontract for Brampton's benefit. TPW2 testified that after Brampton had been added as third party in the present proceedings, Brampton wrote to Isyoda on 17 November 2014 (see p 956 of CBD4) giving 'notice to the defendant that they are to take all steps and actions necessary to enforce their rights and remedies under the subcontract to ensure that the latent escalator defects are attended to by the plaintiff for our benefit'.

E

F

[72] Brampton also directed Isyoda to amend its counterclaim against Sigma to include a breach of contractor's design warranty vide its letter dated 12 January 2015 (see p 970 CBD4). TPW2 testified that despite these two letters, Brampton has 'not seen any positive action on the defendant's part to enforce its rights under the subcontract for Brampton's benefit nor have they heeded our direction to them as stated'. TOW2 added that the Isyoda 'had failed to take direction from us as I stated earlier. Thus I believe the defendant is in breach of the terms of the Settlement Agreement. Surely the defendant cannot insist that the Third Party be bound by the terms of the Agreement when they themselves can pick and choose as to which clauses they wish to be bound by ...'.

G

H

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[73] Putting aside the matter of latent defects which I shall deal with later under the second issue, I am in fact satisfied from the evidence presented that Isyoda has taken every effort under cl 5 to enforce rights and remedies under

- A the subcontract for Brampton's benefit. Isyoda is seen getting Sigma to remedy the defects complained of by Brampton. Isyoda's efforts extend to and include filing the present counterclaim against the Sigma. From the testimonies of Isyoda and Brampton's witnesses, I am further satisfied that Isyoda has taken all efforts necessary to ensure that the project is completed as scheduled. I have not
- B been shown any particular direction or action that Isyoda was required to take but it failed such that Brampton is now discharged from its obligations under cl 12.
- C [74] Next, is the matter of the meetings, especially the meeting of 9 May 2014 and correspondence exchanged between the parties, whether these have the effect of discharging Isyoda from its obligation to pay Sigma.
- D [75] In my view, the answer is in the negative. All these matters reflect efforts, strenuous efforts on the part of all parties to resolve the multi-varied and multi-party disputes that had arisen in the execution of this project. These meetings etc do not alter the conclusions reached above. PW3 and even TPW2 testified that the purpose of the meetings referred to as 'settlement meetings' held between the parties, 'was to find a middle ground between the parties and to settle the outstanding payment of RM1,181,680.90 due and owing to the plaintiff ('the outstanding sum') in an amicable manner without the need for any litigation'. Unfortunately, that purpose 'did not go through'.
- E
- F [76] I must add that settlement meetings are precisely intended to discuss the matters outstanding. The meetings were conducted under cover of goodwill and without prejudice to all the attendees' rights. These meetings should remain under such cover and understanding. In any case, there was no final resolution. The meetings therefore cannot be relied on.
- G [77] Under such circumstances and for the reasons discussed, and subject to my finding on the matter of defects, I fully agree that Isyoda is entitled to be indemnified by Brampton. However, Brampton is only obliged to indemnify Isyoda for the sum due under the subcontract, and not for the additional works.
- H *Whether there are any defects in the escalator works carried out by Sigma? And, if so, who is liable to rectify the defects?*
- I [78] Moving next to the second issue, Brampton claims that the escalators are defective in two respects. The parties have prepared an 'Agreed list of escalator defects or problems'.
- [79] The first defect concerns the step rollers and the step chain rollers. Brampton's witnesses ('TPW1 and TPW2') testified that in 2011 and before

the end of the defects liability period, the escalators were found to be ‘very noisy, made loud screeching noises and has juddering vibrations when the escalators were in operation’ (step rollers and the step chain rollers defects). These escalator defects are said to have persisted despite Sigma’s workmen having attended to them.

A

B

[80] In late 2012/early 2013, TPW1 testified that one of Sigma’s technicians called Ganesh a/l Kanagaratham informed Brampton that the ‘problem with the escalators was that the whole batch of rollers and step rollers used in all the 52 escalators in the complex, were defective. This was also confirmed by the plaintiff’s engineer, one Rabindra Balaetham’.

C

[81] The second defect in the escalators was that the landings of many of the 52 escalators were not flushed with the floor such that the escalator landings were higher than the floor. This posed a potential danger to members of the public using the escalators (escalator landing defects). Brampton claimed that these escalator landing defects were due to the poor installation or construction of the escalators; that Isyoda tried to mitigate the difference in level by constructing an extended platform at the landings to reduce the drop gradually or by highlighting the difference in levels with bright coloured paints.

D

E

[82] Brampton claimed that Sigma had demonstrated that these escalator landing defects were caused by Isyoda in not having provided sufficient drop in the concrete floor slab to accommodate the escalator’s support base resulting in the landing being higher than the floor level by as much as three to eight inches for the various escalators affected.

F

[83] Brampton alleged that both the escalator defects and escalator landing defects are latent defects because the defects could not be discovered by looking at the escalators. The escalator defects were only discovered after the escalators had been in operation or after the escalator pits had been opened.

G

[84] Furthermore, although these defects were reported during the DLP, Isyoda had represented to Brampton that these defects were due to Sigma’s poor installation or construction of the escalators instead of Isyoda’s own defective construction of the landings, which it now claims to be the real cause of such defects. At that time, Brampton had treated these defects as M&E defects to be attended to and rectified by Sigma. Since the defects are still not rectified, and these are really latent defects, Isyoda remains liable for such defects under cl 11 of the SA read together with cl 4 and 5.

H

I

[85] Sigma’s response is that these are structural construction defects for which it is not responsible. That responsibility lay at the feet of Isyoda.

- A [86] Isyoda's responses are as follow. In relation to the escalator landing defects, it argues that these defects or problems were identified during the DLP as seen in the initial notification of defects list dated 29 March 2012. Isyoda had taken responsibility for these problems and it had taken corrective works including readjusting the seating of the escalators at the drop to reduce the magnitude of the unevenness as well as repaving the floor to smoothen out the unevenness. Although it was originally discussed that Sigma would carry out these rectification works, Brampton and Isyoda agreed that Brampton would carry out the correctional works. It was for this reason that a sum of RM350,000 was provided in the SA. This sum was deducted by Brampton from the payment due to Isyoda.
- B
- C

[87] In the matter of the step rollers and the step chain rollers defects, Isyoda supports Sigma in its defence that these defects are baseless.

- D [88] Both Isyoda and Sigma argue that these complaints were raised outside the DLP in which case, both are not responsible for such defects. In any event, there were no complaints at the material time and the inspection and the subsequent certificate of fitness issued by Jabatan Keselamatan dan Kesihatan Pekerjaan on 14 March 2012 is relied on as further evidence of there being no defects as alleged. The juddering and vibrating of the escalators are caused by simple lack of use as testified by PW3. PW3 had testified that the cause of the problem complained of was really the lack of regular operation of the escalators which had caused the rollers to deform and crack.
- E

- F [89] The complaint of manufacturing defect is also not credible as it is not supported by any documentary or any other evidence.

- G [90] I must first and foremost stress that the parties accept that the matters complained of are in fact 'defects', to start with. What they disagree on is that these defects are latent defects; with Brampton submitting that Isyoda and thereby Sigma remaining liable because these are latent defects discovered only after the DLP.

- H [91] Brampton makes its case of the existence of latent defects based on the cause of the defects. According to Brampton, these defects are actually latent defects because there were manufacturing defects in the step rollers and the step chain rollers used and that is why despite being rectified, the problems persisted. Brampton's case seems to be footed on the suggestion that Brampton itself was unaware of the cause of the problem until it learnt of the same from Sigma's employees.
- I

[92] With respect, I disagree. Broadly, there are two types of defects; patent and latent defects. The writers, S Rajoo and Harbans Singh KS in their book

entitled *Construction Law in Malaysia* (Sweet & Maxwell, p 470) have explained: A

... Patent defects are defects that can be discovered through reasonable inspection and testing (see Robinson, Lavers, Tan and Chan, *Construction Law in Singapore and Malaysia*, 2nd edn, p 160). These are the ones that are more commonly noticed and therefore reported to the contractor prior to completion or during the defects liability period. B

On the other hand, latent defects cannot be discovered by either reasonable inspection or testing even by a reasonably careful person skilled in the works in question (see *Victoria University of Manchester v Hugh Wilson* (1984) 2 Con LR 43). These are inherent in the works themselves and become apparent or noticeable or capable of being discovered only when they become patent (see *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1; see also *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* [2000] 1 AMR 3567). C

In practice, patent defects pose no real problems as these are easily discernible and can be addressed timeously. However, the same cannot be said of latent defects which actually manifest themselves years after the completion of the works in question. Such latent defects therefore pose particular difficulties not only to the parties to the contract itself but also third parties such as designers, specialist suppliers and even the authorities. D

[93] It is my finding that both defects are not latent defects for the simple reason that these defects were indeed discovered or identified during the defects liability period, and drawn to Isyoda and/or Sigma's attention. These defects were attended to; in fact a maintenance agreement was entered into between Sigma and the joint management body ('JMB') for the further care of the escalators installed. Whatever the cause, the problem had manifested itself at the relevant time or was discovered, and rectified. E

[94] In relation to the escalator landing defects, from the evidence of PW3 and DW1, I am satisfied that Sigma is not liable for these defects. I accept PW3, Ngu's evidence that Sigma's role was merely to supply and install the escalators in accordance with the specifications contained in the approved shop drawings. 52 escalators were required. These 52 escalators were fabricated and delivered to the site as per the relevant delivery notes. These notes do not reveal any rejection or complaint at the material time. F

[95] According to Ngu, these escalators were hoisted and installed by Sigma on the beams of the structure floor level. The work of ensuring that these escalators are flushed with the floors is part of the finishing work which falls within Isyoda's scope of works. These defects do not come within the scope of Sigma's works. G
H
I

- A [96] Now, is Isyoda responsible then for these defects? The answer is also in the negative; and the reason is this.
- B [97] I accept DW1, Tan's evidence that Isyoda had made the necessary proposals on rectification of these defects when Brampton raised these complaints before the end of the defects liability period, as confirmed by TPW2 – Lim Loke Choy, one of Brampton's Directors. There is evidence that Isyoda had attended to these complaints at the material time. In any case, after negotiations, Isyoda and Brampton finally agreed on the cost of such rectification, a sum of RM350,000; and this sum was included in the settlement agreement that was signed between Isyoda and Brampton. The validity of this agreement is not in question. Therefore, as explained by DW1, the matter of the escalator landing defects is resolved.
- C
- D [98] In respect of the step chain rollers, TPW2, Lim explained that sometime during the 2011 period, there were complaints that escalators numbers 9 and 10 were 'very noisy, made loud screeching noises and has juddering vibrations when the escalators were in operation'. Lim had personally witnessed these complaints. These complaints were conveyed to Sigma who attended to them.
- E Sigma sent its workmen to look into the problems and the problems although lessened, recurred, according to Lim.
- F [99] Lim testified that sometime in May 2013, one of Sigma's Technicians, Ganesh a/l Kanagaratham 'finally divulged on separate occasions both to me and Tan Yee Wei, the Building Manager of JMB, Kompleks Metro Pudu that the problem with the escalators was that the whole batch of roller and step rollers used in all the 52 escalators in the complex, were defective'. Ganesh has written this in a statement and this was produced in court — exh TP1. This was said to be confirmed by another of Sigma's employees, Rabindra Belaetham,
- G Sigma's Sales Engineer. Lim took photographs of the damaged and defective rollers and these photographs were produced at the trial — see pp 577–579 of CBD3. Tan Yee Wei ('TPW1') confirmed this part of Lim's evidence.
- H [100] Ganesh did not testify. Lim conveyed Ganesh's reasons one of which was Ganesh's reluctance to 'go against Sigma'; the other being his fear of jeopardising his career in what he perceived as a 'small' field of expertise. A subpoena was taken out but was never executed. Ganesh was never called to testify.
- I [101] Rabindra on the other hand stepped forward as PW2. He denied having confirmed the matters mentioned by Lim. He explained that he was in no position to confirm the matters stated. He was never involved in the installation of the escalators and he did not deal with all 52 escalators. Of the 52 escalators, Sigma only dealt with the maintenance of 28 escalators which

was common property and which were owned by Brampton at the material time. The balance 24 escalators were owned by Help College and F&N; 12 each. Help College had engaged a different company to maintain and service the escalators while the 12 owned by F&N were not maintained as the escalators are not in operation.

A

B

[102] In this respect, I do not find the claim proved. Bearing in mind that there are 52 elevators at the site, and Brampton only owns 28 of those elevators, there is actually no evidence as to which of the 52 escalators has the problem complained of.

C

[103] Next, there is no evidence that the defects complained of are indeed due to manufacturing defects. All that the court hears of are the noises produced and the vibrations or juddering experienced. The allegation of manufacturing defect, if at all there is any, is from hearsay evidence as the maker of the statement, Ganesh has not been produced before the court. Even accepting that Ganesh had valid reasons for not attending court, which I shall not comment since no subpoena was even served on him in the first place to compel his attendance; Brampton has not produced any evidence to show that Ganesh possesses the technical know-how to make the observations in the first place.

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[104] I accept the evidence of PW2 and PW3 who testified that the damage or defect complained of is actually part of 'wear and tear'. PW3 is a witness with the necessary and appropriate expertise and experience to make these remarks and observations. PW3 has further testified that the batch of rollers brought in for the escalators in this site were also used in other areas without problem. There is, therefore, no basis for Brampton's allegations on both defects.

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[105] In the circumstances, I agree that this complaint and thereby the third party's counterclaim too, is without merit.

[106] A final note on the issues posed between the parties. Isyoda has sought an order that Brampton be ordered to pay directly to Sigma by reason of the agreements already discussed. In its third party notice, Isyoda had also required the question of whether Brampton was liable to Sigma for the sum claimed be determined not between itself and Isyoda, but between Brampton and Sigma. On its determination, Isyoda wants any payments ordered to be paid to Sigma to be paid not by itself to Sigma, but by Brampton directly to Sigma.

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[107] With respect, I cannot accede to the order sought by Isyoda. In view of my findings and decision in relation to the letter of release and wavier and the terms of the subcontract, I find that such an order cannot be made.

A [108] Isyoda's liability to pay Sigma is based on the terms of the subcontract while its right to be indemnified is founded in the terms of the SA. There is no basis and will leave the reading of cll 11–12 as entirely separate and distinct obligations while the contrary is actually the case. The right to be indemnified arises only upon payment that Isyoda makes to Sigma and where Brampton is in breach of not making direct payments to Sigma or any of the other subcontractors. Where Brampton breaches that obligation, the parties have agreed in cl 12 that Brampton is to indemnify Isyoda. In that regard, Isyoda has proven that it is entitled to be indemnified.

C [109] In any case, there is no room or valid reason for any discretion to be exercised, if there is even one to begin with. The order sought by Isyoda will leave the plaintiff, Sigma with an order against a party that the court has already found it has no relationship or agreement with. Acceding to such an order would leave Sigma to look for payment from a party other than Isyoda when the court has already found that it is Isyoda who has to pay Sigma. It is not a question of flexibility or practicality, but one of interpretation and construction of the various agreements put before the court. As said earlier, this is how the parties have seen to how any failure to pay on the part of Brampton is to be resolved; by a promise to indemnify; and the court shall give effect to that promise.

D [110] In view of the court's findings and determination of the second issue, that there are no defects proved; and even if there were any defects, the defects have been rectified (and that would include Brampton's decision to carry out the rectification itself and for which provision of RM350,000 has been made in the SA), I am of the view that Isyoda is entitled to be indemnified by Brampton.

E CONCLUSION

G [111] The upshot is this: Sigma's claim as set out in para 1 of the statement of claim is allowed with interest at the rate of 5%pa from the date of filing to the date of realisation. Isyoda's counterclaim against Sigma is dismissed.

H [112] In relation to the third party claim, I find that Isyoda has proved its claim and it is allowed, but only to the extent under the subcontract; and that is, that the third party, Brampton is to indemnify Isyoda for the sum of RM1,180,291.52.

I [113] The third party's counterclaim is also dismissed.

[114] In the matter of costs, in view of the third party proceedings and the existence of the two counterclaims, these are the order for costs. The defendant, Isyoda is to pay RM50,000 as costs to the plaintiff, Sigma. The third party is to pay Isyoda costs of RM25,000.

Sigma's claim allowed and Isyoda's and Brampton's counterclaim dismissed with costs.

Reported by Kanesh Sundrum

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